THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLOBAL CROSSINGS TELECOMMUNICATIONS, INC., a Michigan corporation; QWEST COMMUNICATIONS COMPANY, LLC, a Delaware limited liability company; SWITCH & DATA FACILITIES CO., INC., a Delaware corporation; LIBERTY MUTUAL FIRE INSURANCE COMPANY, a Massachusetts corporation, Plaintiffs, v. MCKINSTRY CO., LLC, a Washington limited liability company, Defendant.	CASE NO. C11-1464-JCC ORDER DROPPING PLAINTIFF LIBERTY MUTUAL FIRE INSURANCE COMPANY AS PARTY

This matter comes before the Court on Plaintiff Liberty Mutual Fire Insurance Company's response to the Court's second order to show cause. For the foregoing reasons, the Court hereby DROPS Liberty Mutual as a party to this case.

Liberty Mutual's filings in this case, from the beginning, are an example of what *not* to do when trying to get one's case heard in federal court. Rule 8(a)(1) of the Federal Rules of Civil Procedure requires a pleading to contain "a short and plain statement of the grounds for the

court's jurisdiction." At the time Liberty Mutual filed its complaint, Ninth Circuit law clearly established that "the insured, and only the insured, [has the substantive right] to sue for tort damages in subrogation actions [under Washington law]." *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1094 (9th Cir. 2004). Despite this legal backdrop, Liberty Mutual filed what appeared to be a classic subrogation action in its own name, alleging diversity jurisdiction under 28 U.S.C. § 1332, without explaining why its non-diverse insureds (which Liberty Mutual, and thus the Court, refers to as "Clise") were not the real parties in interest—*i.e.*, without providing a "a short and plain statement of the grounds for the court's [diversity] jurisdiction." Nowhere in its complaint did it allege that Clise had assigned to Liberty Mutual its right to sue McKinstry. Nowhere in its complaint did it put this Court on notice that it was *not* pursuing a classic subrogation action. Perhaps it hoped the Court wouldn't notice.

The Court noticed. Only after the Court issued an order to show cause did Liberty Mutual bother to inform the Court that Clise had assigned to Liberty Mutual its right to sue McKinstry, thus distinguishing this case from a classic subrogation action. However, nowhere in its response did Liberty Mutual inform the Court that it had *not* reimbursed Clise for the entire loss Clise suffered as a result of the water leak at issue in this case. Perhaps it again hoped the Court wouldn't notice.

This time, Defendant noticed. McKinstry—not Liberty Mutual—brought the deductible clause of the insurance policy to the Court's attention. At that point, it became clear that Liberty Mutual had also failed to comply with Rule 17(a)(1) of the Federal Rules of Civil Procedure. That rule requires that "[a]n action [] be prosecuted in the name of the real party in interest." *Both* Liberty Mutual *and* Clise are, unmistakably, real parties in interest to this lawsuit: The complaint asks for damages sustained by Liberty Mutual "and/or its insured"—*i.e.*, for the full loss, not just the amount Liberty Mutual reimbursed Clise. Yet Liberty Mutual never named Clise as a plaintiff. Liberty Mutual's reason for flouting Rule 17(a)(1) is clear: Naming Clise as a plaintiff would have destroyed this Court's jurisdiction. Perhaps it again hoped the Court

wouldn't notice.

The Court noticed. Liberty Mutual now asks for the Court's leave to amend its complaint to clarify that it is seeking only $5,279,915.66—and not also, on Clise's behalf, the $25,000 loss that Clise suffered.

Too little, too late. The Court will not tolerate these games. Insurance companies are sophisticated parties, with sophisticated lawyers at their disposal, who know the difference between subrogation and assignment and are familiar with the real-party-in-interest rule. They may not knowingly file a jurisdictionally-lacking complaint, close their eyes, hope for the best, and suffer no consequences once the jurisdictional defect surfaces.

Even if this Court were to grant Liberty Mutual's motion for leave to amend its complaint, it would find jurisdiction lacking on the basis that Clise is an indispensible party to Liberty Mutual's lawsuit that destroys the Court's diversity jurisdiction. *See* Fed. R. Civ. P. 19(b). Liberty Mutual assures the Court that Clise has no intention of ever filing a claim against McKinstry, and so McKinstry will not be prejudiced by proceeding only against Liberty Mutual. The Court has no doubt that Liberty Mutual is willing to say anything—and get Clise to say anything—to keep this case on schedule in federal court. But Clise's promises are not enough to convince the Court of its indispensability. If the Court were to grant Liberty Mutual leave to amend its complaint so as to demand only its $5,279,915.66 loss, the Court would render it a certainty that Clise would never receive compensation for the $25,000 loss it allegedly suffered as a result of the leak. The Court can avoid that prejudice to Clise only by dropping Liberty Mutual from this lawsuit and allowing it to file its original complaint—for the entire loss, on behalf of itself and Clise—in state court. *See* Fed. R. Civ. P. 19(b)(1) (court should consider "the extent to which a judgment rendered in the person's absence might prejudice that person" in determining "whether, in equity and good conscience, the action should proceed among the

existing parties or should be dismissed").[1] Moreover, Liberty Mutual has an entirely "adequate remedy if the action [is] dismissed for nonjoinder," Fed. R. Civ. P. 19(b)(4): It can file its complaint in state court. These factors weigh in favor of a determination that Clise is an indispensible party to Liberty Mutual's lawsuit, and the Court so finds. *See, e.g.*, *Axis Ins. Co. v. Hall*, --- F.R.D. ----, 2012 WL 5879136, at *4–9 (D. Me. 2012) (holding that partially-reimbursed, non-diverse insured was indispensible party, and dismissing for lack of diversity jurisdiction); *Universal Underwriters Ins. Co. v. Tony DePaul & Sons, Inc.*, No. 01–0631, 2001 WL 1175146, at *2–3 (E.D. Pa. Jul. 25, 2001) (same); *Travelers Indem. Co. v. Westinghouse Elec. Co.*, 429 F.2d 77, 79–80 (5th Cir. 1970); *Reliance Ins. Co. v. Wis. Natural Gas Co.*, 60 F.R.D. 429, 431–32 (E.D. Wis. 1973); *Potomac Elec. Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486, 490–93 (D. Md. 1972).

Although Clise is an indispensible party to Liberty Mutual's lawsuit, Liberty Mutual is not an indispensible party to the remaining Plaintiffs' lawsuit. Thus, the Court DROPS Liberty Mutual as a party. *See* Fed. R. Civ. P. 21. The remaining Plaintiffs have advised the Court that they have settled their claims against McKinstry. The Court thus respectfully DIRECTS the Clerk to TERMINATE McKinstry's motion for summary judgment (Dkt. No. 23), Plaintiffs' motion to exclude McKinstry's expert (Dkt. No. 38), Plaintiffs' motion for partial summary judgment (Dkt. No. 58), and McKinstry's motion to strike Plaintiffs' reply (Dkt. No. 81), and to VACATE the trial of this matter scheduled for March 18, 2013. The Court ORDERS the remaining parties, within thirty days, to file either a notice of settlement and stipulation of

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[1] Indeed, Washington regulators appear to have been concerned with exactly this kind of prejudice to insureds when they promulgated Washington Administrative Code § 284-30-393, which provides that "[t]he insurer must include the insured's deductible, if any, in its subrogation demands." If an insurer could avoid its § 284-30-393 obligation by calling a subrogation an assignment, and thereafter pursuing an action for recovery only of the amount it reimbursed its insured, that regulation would be rendered toothless. There is thus at least reason to doubt whether Liberty Mutual *can* amend its complaint to drop its demand for Clise's deductible (and if it cannot, then Clise is a real party in interest to this action that destroys this Court's diversity jurisdiction). The Court need not reach this issue given its finding of Clise's indispensability.

dismissal, or a joint status report explaining their failure to do so. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii).

DATED this 4th day of February 2013.

John C. Coughenour
UNITED STATES DISTRICT JUDGE